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July 21, 2016

Communications and Technology Subcommittee Chairman Greg Walden
c/o Greg Watson, Legislative Clerk
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Thank you again for the opportunity to share my views on the Federal Communications Commission's (FCC) proposed privacy rules with the subcommittee at the June 14, 2016, hearing entitled "FCC Overreach: Examining the Proposed Privacy Rules." Please accept my answers below to the additional questions for the record.

The Honorable Adam Kinzinger

1. **Mr. Brake, you acknowledge the only other examples of sector-specific privacy regulations exist when there is a heightened risk of disclosure of sensitive personal information, which are financial and healthcare services. What evidence or reason did the FCC have when proposing these rules to a specific sector of the internet ecosystem?**

While I am certainly not familiar with all of the factors that lead the FCC to propose the rules that it did, a charitable interpretation of its actions would recognize three main points.

First, the FCC privacy proposal mirrors the legacy section 222 regulations as they were applied to telephone networks. In that context, the FCC used the same three-tier consent framework. This would conceivably make the rules easier to defend in court In the privacy notice of proposed rulemaking (NPRM), the FCC put it simply: "we propose to apply the traditional privacy requirements of the Communications Act to the most significant communications technology of today."[1] But I see this assertion from the FCC as self-indicting: when it comes to broadband Internet—the "most significant communications technology of today"—we should take care to regulate in a way that does not limit its growth or potential for innovation, not simply import rules written in the mid-1990s, for a different and altogether simpler type of network. Moreover, the legacy section 222 rules were explicitly a tool to facilitate competition in the provision of telephone services—

[1] FCC, *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106 (Apr. 2016), at 2, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-39A1.pdf.

not for privacy. When crafting competition regulations in a market a regulator is trying to open to competition, it makes sense to make narrow, specific rules. The Internet, on the other hand, is incredibly dynamic and complex, with competition expanding across traditional industry sectors. In regulating here, an ethos of "do no harm" should guide the Commission: better to hew close to the established Federal Trade Commission framework that successfully oversaw privacy practices of the broadband industry up until Title II common carrier classification.

Second is the "choice" argument. The FCC points to the fact that once a user is connected to a broadband service, he or she cannot avoid the network in the same way one can choose from the variety of websites or edge services. I think this argument is misleading for a number of reasons. First of all, the FCC has understated the number of choices most consumers have for broadband providers. By considering only connections of 25 Mbps or higher as broadband (by this measure South Korea is the only country in the world that makes "broadband" available to the majority of its citizens), the FCC paints a distorted picture of broadband choice. But more importantly, this "choice" argument does not justify the heightened privacy rules proposed. Every major broadband provider already offers customers an opportunity to opt out of targeted advertising programs—when privacy-sensitive customers can simply opt out, there is no need to switch ISPs to find the privacy policy one likes. An opt-out should offer consumers sufficient choice to protect their privacy, and better balances that legitimate interest with the benefits that flow from increased sources of data to fuel our information-based economy.

The third reason the FCC has given for heightened rules is the position of ISPs as a conduit for all information a consumer accesses online. I think this does not do the work the FCC requires of it, for the reasons outlined in my answer to your second question below.

2. **Mr. Brake, at the recent Senate hearing on privacy, Chairman Wheeler attempted to contrast what an ISP can collect from its customers with what a website can collect. The FCC Chairman asserted that "Only one entity connects *all* of that information…and can turn around and monetize it." He also claimed that when an individual goes to a website to enter information, that it is the consumer's choice and only that website receives and is able to use that information. That seems to be an incorrect assessment of how consumer data is collected on the Internet, and who is engaged in such collection. Do you agree with Chairman Wheeler's description and analysis?**

I believe Chairman Wheeler has significantly overstated how much information an ISP can collect, and

detailed just this point in an op-ed titled "The FCC's Privacy Ruse."[2] Professor Peter Swire's much-discussed report outlines many of the reasons ISPs have limited access to information—most notably the remarkable uptake in encryption that limits ISP access to content of electronic communications, the small but growing use of virtual private networks and other proxy services, as well as consumers' use of multiple networks throughout the day.[3]

The Honorable Gus Bilirakis

1. **Mr. Brake, you make an interesting point about how this overreaching shift against ISPs will narrow the businesses down to one of pure transport. Can you expound a little about the effect on future innovation and the handcuffing of job creation that might result from this?**

I very much view the proposed rules as designed more to constrain business models of ISPs than to protect consumer privacy. And the proposed privacy rules are only one step in the broader imposition of Title II common carrier regulations imposed by the FCC. Populist activists would like to see the FCC go even further and impose price regulations or even unbundling elements of the network in the name of superficial, service-based competition. This line of reasoning wrongly views the applications and services riding on top of the Internet as the only source of dynamic innovation—they prefer broadband providers as a simple dumb pipe to access the Internet, and turn a blind eye to the innovation and investment required to make abundant bandwidth available throughout America. The key to taking us off this path is an alternative legal authority for baseline net neutrality rules other than Title II of the Communications Act. I commend this subcommittee's work in considering an update to the Communications Act, and hope the next session presents an opportunity to continue that effort.

Sincerely,

Doug Brake
Telecommunications Policy Analyst
Information Technology and Innovation Foundation

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[2] Doug Brake, "The FCC's Privacy Ruse," *Forbes Opinion* (Apr. 2016) http://www.forbes.com/sites/realspin/2016/04/27/the-fccs-privacy-ruse/#2d1f224710aa.
[3] Peter Swire, et al., *Online Privacy and ISPs: ISP Access to Consumer Data is Limited and Often Less than Access by Others* (Feb. 29, 2016), *available at* http://b.gatech.edu/1RIWXUa.